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IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT W MUSSER

Petitioner, vs.

SALOMON/SMITH BARNEY, INC.

Respondent.

On Petition For Writ Of Certiorari
To The United State Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert W Musser
Petitioner
12740 Ginami St.
Anchorage, AK 99516
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29pp

QUESTIONS PRESENTED FOR REVIEW

1) FEDERAL JURISDICTION
Ruling against State jurisdiction contracted in the uniform, national State licensing agreement involving the jurisdiction of fifty States; and Alaska's Long Arm Statutes.

2) THE NINTH CIRCUIT DENYING A REGULATORY APPEAL, IN A CULTURE OF DISCRIMINATION AND ABUSE. The Ninth Circuit "profiles" citizen complaints and excludes them from judicial review.

3) THE APPEARANCE OF CRIMINAL CONDUCT IN THE FEDERAL JUDICIARY. Altered transcript and a unified refusal to review this claim.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert W. Musser, petitions for writ of certiorari to review the judgements for the United States Court of Appeals for the Ninth Circuit and the United States District Court for the District of Alaska

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JURISDICTION OF THIS COURT

The underlying case was removed from State Court to Federal District Court on a diversity action, 28 U.S.C. 1332.

The Ninth Circuit dismissed the appeal on February 16, 2000.

A Petition for Rehearing was denied and recorded on the 30th day of May, 2000. This Court's jurisdiction is respectfully invoked under 28 U.S.C. 1254(1) and Supreme Court Rule 10(a) "an exercise of its supervisory power".

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STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARBITRATION LAWS

9 USC 1, Chapter 1, Section 1

Sec. 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, **but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.** *emp. added*

9 USC 1, Chapter 1, section 2

Sec. 2. Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and **enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.** *emp. added*

9 USC 1, Chapter 1, section 4

Sec. 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for

arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. **If the making of the arbitration agreement** or the failure, neglect, or refusal to perform the same be in issue, **the court shall proceed summarily to the trial thereof**. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court a jury for that purpose. If the jury find that no agreement in writing for shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. *emp. added*

SECURITIES LAWS

15 USC 2b, Subchapter 1

Sec. 77v. Jurisdiction of offenses and suits

Federal and State courts; venue; service of process; review; removal; costs. The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, **concurrent** with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and **brought in any State court of competent jurisdiction shall be removed to any court of the United States.** No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

15 USC Chapter 2b, Section 78o

Registration of all persons utilizing exchange facilities to effect transactions; exemptions

It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of he mails or any means or instrumentality of interstate

commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) **unless such broker or dealer is registered** in accordance with subsection (b) of this section. *emp. added*

BD FORM

UNIFORM STATE LICENSING AGREEMENT
UNIFORM APPLICATION FOR DEALER-BROKER REGISTRATION

Execution: **For the purpose of complying with the laws of the of the State**(s) I have designated in Item 2 relating to either the offer or sale of securities or commodities, I hereby certify that the applicant is in compliance with applicable state surety bonding requirements and irrevocably appoint the administrator of each of those State(s), or such other person designated by law, and the successors in such office, my attorney in said State(s) upon whom may be served any notice, process or pleading in any action or proceeding against me arising our of or in connection with offer or sale of securities or commodities, ***or*** **out of the violation or alleged violation of the laws of those State(s)** and I do hereby consent that any such action or proceeding against me **may be commenced in any court of competent jurisdiction and proper venue *within* said** State(s) by service of process upon said appointee **with the same effect as if I were a *resident* of said state(s).** emp. added

Regulatory Right To an Appeal

Federal Appellate Rule 3

"An appeal permitted by law as or right from a district court to a court of appeals... ."

Canon of Ethics of the Judiciary

Canon 1, "A Judge Should uphold the Integrity and Independence of the Judiciary.

Canon 3, "A Judge Should Perform the Duties of the Office impartially and Diligently

———— XXXXX ————

STATEMENT OF THE CASE

The petitioner filed a "wage and hour" complaint in Alaska's State Superior Court. The petitioner was not indigent, but without the funds to hire an attorney as many employees that are dismissed for opposing a theft of wages in the securities industry. The case was removed to Federal Court under a diversity action. Motion to Remand denied. Arbitration ordered. Jurisdiction appealed. In appeal, it became apparent the Federal transcript was incomplete and the District Court was notified by affidavit. There were other filings and procedures that are not pertinent. After notification to the District Court of an incomplete transcript of Judge Klenfield and reporting the incomplete transcript to the Department of Justice and the FBI, the District Court knowingly dismissed the case while it was in appeal for "failure to prosecute".

The jurisdiction and the dismissal was appealed and denied by the Ninth Circuit's staff personal. The case was timely re-filed in State Court under the State's "save clause" for wrongful removal. The defendants again removed the case for diversity. The case was randomly assigned to the head District Judge. The head Judge, in his order, stated he reached agreement with Judge Sedwick, the judge that dismissed the prior case, and assigned it to him. The Judge Sedwick refused to consider his newly published opinion in a jurisdictional case where he defined and invoked the minimum contacts for Alaska's Long Arm Statutes and opposed forum shopping, then again dismissed the case. Judge Sedwick refused to address the "forum selection clause" in the BD Form and in a rehearing refused to address the "forum selection clause" and dismissed the case stating the petitioner was arguing "arbitration".

Appealed to the Ninth Circuit for jurisdiction and the dismissal of the case. Circuit staff personal again denied the Appeal upholding the District Court.

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ARGUMENT FOR GRANTING PETITION

The uniform State licensing agreement is the cornerstone of "concurrent" jurisdiction of the Securities Laws. In agreeing to follow the State's Securities Laws, the firms contracting to do business in the subject State is agreeing to the jurisdiction of the State's Courts and to follow (all) of the State's Law as if a resident of the State. To allow the Ninth Circuit to set aside, even in an unpublished opinion, the standard State licensing for the fifty States, creates an inconstancy among the Circuit Courts. There appears to be no case law on this uniformly accepted contract, the BD Form. The issue is the State's right to license, contract, a forum selection like the forum selection clause the Supreme Court enforces in the mandatory licensing agreement for employee's in the securities industry that contains arbitration clauses.

The second issue of the Ninth Circuit "profiling" citizen appeals clearly violates their oath of office of the Federal Judiciary to administer justice to the rich and poor alike. As a citizen, the petitioner hopes this is not the standard for the Federal judiciary and submits it jeopardizes the "independence" of the Federal judiciary and should not be allowed under the "standard setting" obligation of this Court.

The issue of illegal conduct and judicial abuse goes without any acknowledgement of the Judicial Branch and has refused to review the claim. This refusal, in itself, gives the appearance of an impropriety. The petitioner submits that the lack of any review to such a claim mandates an external review of the Judiciary.

ARGUMENT

1) JURISDICTION

The Federal Court did/does not have jurisdiction to hear and dismiss the underlying case. This Court has ruled jurisdiction can be raised at anytime, even during appeal. Jurisdiction was not addressed fairly in the District Court or in appeal by the Ninth Circuit.

The Petitioner filed this case in State Supreme Court for willful violations of Alaska's "Wage and Hour Act". Removed to Federal District Court under 28 USC 1332 for diversity jurisdiction. The State's Long Arm Statutes clearing grant State jurisdiction as ruled on by the published opinions of Judge Sedwick and Judge Kleinfeld, the two prominent Federal judges ruling in this case.

Judge Sedwick states in MUNOZ v. ALBUQUERQUE, 829 F Sup. 309, that A.S. 09.05.015 gives jurisdiction to the State to the greatest extent that the U. S. Constitution allows. Judge Sedwick then invoked Alaska's Long Arm Statute for jurisdiction to a non-resident living out of state with only one business contact in the state. The respondent has had a constant presence in the state with about 20 employees, contracted legal counsel in state, for a period of over 20 years.

The "minimum contacts" requirement is clearly exceeded with the respondent corporation having an office of 20 employees in the state and maintaining it for twenty years. As this Court has ruled, the forum is the plaintiff's choice, not the defendants as allowed by Judge Klenfield and honored by Judge Sedwick.....then rubber stamped by the Ninth Circuit. In addition, the defendants counsel invoked an arbitration order in Federal Court, mandated by 15 USC 2b, section 78o to be signed. This arbitration clause, and others, are enforced by the Federal Courts against the fundamental "rules of contracts", and directly against 9 USC 1, section 2. If an employee does not sign these arbitration clauses, joining these organizations, **they are terminated.**

The standard nationwide National Association of Securities Dealers' (NASD) State licensing agreement (BD FORM) is to complete the statutory scheme of **concurrent**

securities jurisdiction in 15 USC 2b, Subchapter 1, Sec. 77v.

The BD Form was signed by the respondent with full knowledge of the intent of agreeing to the State's jurisdiction and their existing right to a diversity claim. The key phrases in this licensing agreement are **"to submit to the laws of the State, to be sued an any Court of competent jurisdiction in the State, as if a resident of the State". The respondent enforces State licensing agreements on their employees on a per phone call basis.** The attorney moving for diversity in front of Judge Kleinfeld was unaware of the forum selection clause, as was Judge Kleinfeld. Judge Kleinfeld then stated it didn't make any difference whether he had jurisdiction. (A10) There appears to be no case law on this universal national licensing agreement.

In the day to day practice in the securities industry, the jurisdiction of a non-resident State is enforced on a per telephone call basis. Some State's have laws and regulations limit the time of day you can call a prospect. To be able call an existing client in another State for an extended vacation you have to get license in that state. The respondent teaches and enforces that an employee be licensed in the non-resident state.. In this case, where the Alaska State laws have a deterrent, specifically jail time and daily fines for taking an employee's pay without prior written consent; the respondent has successfully engaged in forum shopping in a friendly Federal form. Federal law treats this conduct as a "contract dispute". There is a circle of abuse, privilege, and credibility here.

The Petitioner filed a complaint with the NASD as ordered by the District Court. The petitioner also notified the NASD about the District Court's ruling on jurisdiction (BD FORM) and it was being appealed. The NASD's attorney offered to and stayed the arbitration until "after the appeals process was complete", not wanting to waste its resources on a case that would be overturned. There was a noted, frustrated comment made by this attorney, that "it doesn't take much to be a Federal Judge".

2) THE NINTH CIRCUIT DENYING A REGULATORY APPEAL, IN A CULTURE OF DISCRIMINATION AND ABUSE

It is self evident that the intent of the designers of the Constitution was to construct a government that had credible checks and balances in its functions to prevent the evolution of abuse of power as described in "*Lee v.Weisman*", 505 U. S. 577 (1992).

The head judge of the Ninth Circuit, Judge Hug. Jr., is quoted in a report of breaking up the Ninth Circuit that the circuit **"profiles"** citizen appeals and assigns them to staff personal for disposition.

From a corporate background, a similar example of this type of discrimination is a Board member of a corporation casually stating "you know a woman just doesn't understand our type of business". I submit that the CEO will not place a woman in upper level management unless they are twice as competent as an acceptable male.

When a senior authority figure, the Chief Judge of the Ninth Circuit, openly defines and designates that one class of citizen is "less than" another.....the culture of discrimination is in place. It is self evident to say that a staff person does not realistically have the authority to overturn a sitting judge. With the emphasis by Judge Hug on increased efficiency with this process, a staff person also understands that they are not to do an extensive review or research in their dismissal function. In this culture, it is self-evident that a sitting judge would take exception to being overturned. Judge Hug stating the policy of the Ninth Circuit, in his **boasting** about the Circuit increased efficiencies, defined an entire circuit **violating their personal oath of office** to administer justice to the rich and poor alike. In addition violating the intent of the **construction** of our form of government.

In oral augments on jurisdiction, Judge Klenfield stated it did not matter if he had jurisdiction and that I was going to be ordered to arbitration.. He ruled that the NASD/NYSE membership agreement was the petitioner's employment

contract. This placed his order to arbitration directly against the language of 9 USC 1, section 2. This ruling was missing in the Court's transcript. Judge Klenfield was unaware of the concurrent jurisdiction with the States or the language in the BD FORM, and subsequently ruled in error. This incorrect ruling was upheld by the Ninth Circuit. The petitioner submits the checks and balances have failed in a "citizen complaint".

The over riding phrase in this "culture", starting in law school, is "that an individual that represents himself is a fool". Judge Singleton, the head District judge in the Anchorage District, was quoted in the local paper stating his discriminatory version of the "phrase" to the State Bar. This gives the appearance that the Federal Court does not have the character or the capacity to administer justice or uphold their oath of office of the Federal Judiciary. In addition, this gives the appearance that the Federal Court is a friendly court for members of the bar defending against "citizen" complaints.

As a citizen, the petitioner notes there is **accountability and checks and balances in the State judiciary.** With the Ninth Circuit's policy of profiling "citizen complaints", the Petitioner submits it is self evident that a Federal District judge does not expect to be overturned on appeal by the Ninth Circuit. With this latitude understood, it allows a statement like Judge Klenfield that it does not matter if he has jurisdiction or not and it provides a shield to Judge Sedwick dismissing the case while in appeal for "failure to prosecute". With the Ninth Circuit upholding Judge Sedwick's conduct, **a citizen is <u>not</u> entitled to an appeal.**

When the discrimination and the "friendly" Federal Court is understood by the bar then you have bogus motions, arguments, and improper removals from State Court. One of many bogus arguments, after the case was refilled in State Court under the State's save clause, the defendants' council claimed the original case was filed late outside the statute of limitations and that the case should be dismissed. For this to be a legitimate error as claimed, the attorney would had to assume that his law firm, the judge, the Ninth Circuit and their

staff, and the plainiff all missed that date in the original case. A false, ludicrous claim presented in clearly a friendly Court.

The Supreme Court identifies the understanding of the **evolution of a abusive culture** in "*Lee v.Weisman*" 505 U. S. 577 (1992). In "*Lee*", this Court denies school prayer due to the **potential of future abuse of the "State"**. In addition, the Court describes an understanding of sensitivity to people **"feeling excluded".** This Court **defines** the degree of importance of the evolution of the abuse of power and exclusion as it denied a community from their choice of providing a positive code of conduct in opposition to the First Amendment. This concern of exclusion has misaligned a large group of citizens with this Court that believe that the **"power of prayer"** and a religious code of conduct prevents violence. This concern is amplified with the increase in school violence since this ruling in 1992.

The culture of the Federal judges in Alaska and the Ninth Circuit is **abusive and exclusionary**. The question today is what and where is the accountability that the designers intended in the construction of our government for the Judicial Branch? As a citizen, I do not have the funds to buy a visit to my congressional representatives. The Petitioner did file a written complaint, after three months of "Washington is handling it, "you'll hear from them". Washington saying, "the local office is handling it", it was clear their was no concern about finding out whether Judge Kleinfeld hand dirty hands. The concept that one person can vote out a Senator as a "checks and balance" is ludicrous when the government will not even investigate itself.

When the head District Judge's order assigning Judge Sedwick to my case, with claims of abuse of discretion by Judge Sedwick in the complaint, the issue is the open statement by the head Judge of his "deal making" in the assignment. If the head judge was concerned about the appearance of misconduct, he would have heard the case himself.. As a citizen, when the judiciary makes public statements of **no character, submited in a bragging way to congressional members, that are the current checks and balances of our Constitution for the Judiciary is not adequate.**

Excerpt: Judge Kleinfeld's discussion of politics and the Judiciary from the "Commission on Structural Alternatives for the Federal Courts of Appeals", December 18, 1998.

> "And I am sure that with your political experience, you recognize that bar resolutions, newspaper editorials, magazine articles, and contributions to the debate also take judicial time. When I was on the board of governors of the Alaska Bar Association almost twenty years ago, the chief judge of the district court came to our meeting and asked us for a resolution opposing a Ninth Circuit split. As I recall, the chief judge had asked him to solicit it. **When he left the room so that we could deliberate privately, we agreed that none of us much cared whether the Ninth Circuit was split, but we all cared whether the chief judge was happy with the organized bar, so we gave him a unanimous resolution.** He had spent the better part of a morning getting it. Judicial attention to whether the Ninth Circuit should be split, including testimony in Congress, phone calls, letters, contacts, interviews, meetings with newspaper editorial boards, faxing, mailing, clipping, and compiling, has been extensive for decades. All this judicial attention to the split issue takes a lot of time away from deciding cases. And it will not stop until Congress splits the Ninth Circuit." *emp. added*

Inside the question of abuse of the judiciary and its culture, is Judge Kleinfeld's focus on "political rights and the judiciary". The question of appointing judges to cases based on their predisposition is also raised. Was Judge Klenfield **assigned** to the Exxon Valdez Oil Spill appeal as a predisposed pro oil judge to overturn a jury verdict? Judge Singleton had no hesitation in making an agreement with Judge Sedwick, and stating so, and assigning this case to him with claims of judicial abuse of discretion. Is not Judge

Singleton, with his actions, defining his understanding of the Ninth Circuit's case assignments?

The petitioner submits that the conduct of the Ninth Circuit is so far departed from the accepted and usual course of judicial proceedings to call for an exercise of this Court's supervisory power. Supreme Court Rule 10(a)

3) THE APPEARANCE OF CRIMINAL CONDUCT OF THE FEDERAL JUDICIARY

As a veteran, a past nuclear warhead courier/custodian, a Battery Control Officer with over 140 personnel, and a citizen; I believe that Judge Sedwick dismissed the underlying case, while in appeal, to cover up for Judge Klenfield who probably had the transcript cleaned up. Judge Klenfield had been reported in the newspaper by the Bar to be the least qualified of the Federal candidates, but was pro oil. (referring to the senior senator who was promoting him as pro oil, now promoting him for the Supreme Court).

After the sound technician stated the official court tape of Judge Kleinfeld had been electronically altered and he already notified the Court, the petitioner called the office of the Federal District Attorney. The attorney listened, but said they would not get involved unless it was fully investigated by the FBI. The petitioner's dad took the complaint of the "appearance of criminal conduct by the judiciary" to the Anchorage FBI office. On the petitioner's dad's third visit to the FBI, he asked the FBI agent what was going on. The agent took my dad in the back room, he had no record of the prior complaints, gave him back his copy of the complaint and said, "when the public finds out what's going on around here, there will be a revolt".

It was clear this agent was too afraid to even document this claim of abuse in this culture. I have been advised that a claim of criminal activity of a Federal Judge is to be reported to the U. S. Attorney General immediately.

On the Court's tape, there is **no going on and off the record**. The part that freezes in a person's mind, is the Judge

interrupting your argument, making a clear biased ruling against you without the request of the defendant's attorney. Then, makes a totally off the wall ruling....."I am ruling that your membership agreement is your employment contract". When the sound technician had it on his computer analyzer, there were no breaks at that point in the tape. There was one very long sentence by the petitioner that started before Judge Kleinfeld's ruling and continues after it **with no breaks in spacing or cadence of the petitioner's voice**. At the end of the transcript, Judge Kleinfeld refers to his ruling of the employment contract that is no where else in the transcript..

The petitioner submits that a legitimate investigation of these events will prove that the Judiciary has a practice and capacity to alter Federal evidence for their own benefit, which is a felony for a citizen. The sound technician said he had the only equipment it the State to alter the tape in the manner that it was altered and the he did not do it.

The petitioner submits it would be Constitutional for this Court to strike down all Federal practices of **denying** "free speech" for all Federal "citizens" who have to turn their head to abusive, illegal conduct. Every Federal agency that I have worked for has had some form of the practice of denying free speech for the protection of its senior officials. The function of "free speech" is for the exact purpose of being able to talk about our government, yet the government punishes its own and does not have the character to allow it at our country's detriment. **This restriction of free speech is a characteristic of a repressive government, not a government of laws and equality.**

In "*Lee v.Weisman*" 505 U. S. 577 (1992) this Court expresses **concern about the future evolution of "abuse of power"**. The petitioner requests this Court to deal with the **"current abuses of power"** under its immediate jurisdiction. It also brings into question whether the "checks and balances" of the Constitution are adequate for the Judicial Branch.

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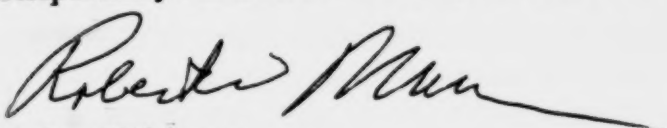
REQUEST FOR WRIT OF CERTIORARI

The Constitution and all composite documents mandate an "equality in the adjudication of justice for all its citizens". Every element in the construction of our government was based on checks and balances to prevent the evolution of "abuse of power" as outlined in "Lee". Justice is not being administered in the Ninth Circuit in citizen appeals. If the Federal Court system has difficulty in administer justice, as Judge Kleinfeld describes, why does the Federal system pursue jurisdiction from the States? The Federal Courts religiously enforce a licensing agreement for security's employee complaints as a contract and orders arbitration in an employer managed forum that has no deterrent In the alternative, it does not enforce the countering employer licensing agreement that employers sign to do business in a State forum that does have a deterrent for employee abuse. The petitioner requests this Court to exercise its supervisory power, hear this petition, and take whatever actions it deems appropriate to rectify these claims and to administer justice to the "citizens" of this country.

Respectfully submitted this 30 day of October, 2000



Robert W Musser
Petitioner

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

ROBERT W. MUSSER) Plaintiff,) vs.) SALOMON/SMITH) BARNEY, INC.))	**A98-257 CV (JWS)** **ORDER FROM CHAMBERS** Motion for Summary Judgement

I. MOTION PRESENTED

At docket 17, defendant Solomon/Smith Barney, Inc. moves for summary judgement. The motion is opposed at docket 19 by Plaintiff Robert W. Musser (Musser).

II. BACKGROUND

Smith Barney's corporate predecessor, Shearson Lehman Hutton, Inc ("Shearson Lehman), terminated Musser's employment on May 6, 1987. Musser filed suit in state court on May 3, 1989. Shearson Lehman removed to federal court. The court dismissed Musser's suit for failure to prosecute on January 17, 1996. Musser appealed. On November 19, 1996, the Ninth Circuit affirmed. Musser refiled suit in state court on March 5, 1998. Musser's complaints are essentially identical with the only apparent difference being substitution of Smith Barney for Shearson Lehman in the latest complaint.

III. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgement should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.

The moving party need not present evidence, it need only point out the lack of any genuine dispute as to material fact. Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. All evidence presented by the nonmovant must be believed for purposes of summary judgment and all justifiable inferences must be drawn in favor the nonmovant.

However, the nonmoving party may not rest upon mere allegations or denial, but must show that sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.

IV. DISCUSSION

A. Limitations

Musser's complaint is timed-barred. Musser's cause of action arose no later than May6, 1987. When Musser filed suit, contract claims were governed by a six year limitations period and the tort claims by a two year period. AS 9.10.240 does not save Musser's claims because the case was dismissed on January 17, 1996.

B. Res Judicata

Federal Rule of Civil Procedure 41(b) provides in relevant part, "[u]nless the court.... other wise specifies," a dismissal for failure to prosecute "operates as an adjudication upon the merits." The court's order dismissing Musser's prior complaint for failure to prosecute did not "otherwise specify" that the dismissal was without prejudice. As a court of competent jurisdiction issued a final judgement on the merits involving the same parties and claims, Musser's complaint is barred by *res judicata*. Musser's arguments regarding Alaska law are without merit.

B. Rule 60(b) Relief

Musser's opposition references Federal Rule of Civil Procedure 60(b) and requests his case be "reinstated." In

recognition of Musser's *pro se* status, the court has conducted an independent review of the record. This court finds no basis for vacating the prior judgment under the Federal Rule of Civil Procedure 60(b).

Conclusion

For the foregoing reasons, Smith Barney's motion for summary judgment at docket 17 is **GRANTED**.

DATED at Anchorage, Alaska, this 16th day of October 1998.

"s/ JOHN W. SEDWICK"
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

ROBERT W MUSSER,	)	
	)	
Plaintiff	)	
vs.	)	
	)	A98-0257 CV (JS)
SALOMON/SMITH BARNEY	)	
INCORPORATED,	)	
Defendants	)	

MOTION TO ENFORCE FORUM SELECTION CLAUSE

The nonresident defendant has entered into and ratified a forum selection clause to be sued in State Court for the violation of State laws as if a resident of the State.

Due to the interstate and international character of the securities business, where a agent of a securities firm calls anywhere in the world to do business, there is a practice of layers of licensing and regulations by many regulatory bodies to satisfy jurisdictional issues and the adjudication of justice. The issue presented in the BD FORM, signed by the corporate defendant's predecessor EF Hutton, is to have the right to do business in the State of Alaska as a licensed securities agent, as a non-resident. They contracted with the State to submit to the jurisdiction of any competent Court in the State, to be sued for violation of its laws, as if a resident of the State.

The question under the Ninth Circuit rulings for forum selection is whether this contract is **permissive or mandatory**, and **exclusive**, to be enforced and ordered to State Court.

With the layering of regulatory bodies and **concurrent** jurisdictions of the securities business, the plaintiff requests the Court to review the forum selection clause in its whole, and the intent and the understanding of all parties. The BD Form is the

standard national form for the stated purpose of having nonresidents comply with the jurisdiction of the stated State. The issue is whether this national form is compliant with the contract language requirements of the Ninth Circuit.

The Ninth Circuit in Northern California District Council of Laborers vs. Pittsburg-Des Moines Steel Co., 95 CDOS. 8699, (9th Cir 1995) would make the language permissive and not mandatory **until** considering the added language of **"to be served as if a resident of the State".** The last clause written with full knowledge of 28 USC 1446, the removal statute, is specifying State Court if the action is brought there and excluding Federal Court. This language makes the added State forum the plaintiff's choice, as in the ruling by this Court in MUNOZ v. ALBUQUERQUE, 829 F Sup. 309. This additional language, as in Docksider v Sea Technology, 875 F2d 762 (9th Cir. 1989) makes the BD Form a **mandatory forum selection clause**.

IN COMPARISON

The **forum selection clauses** enforced by Judge Kleinfeld, and later upheld by this Court and the Ninth Circuit on appeal, are listed below. All three arbitration clauses are required to be signed as a condition of employment. **None of them comply** in any manner with the Ninth Circuit's requirements for the contract language of a forum selection clause **to be mandatory and/or exclusive**, forcing the plaintiff to arbitration.

Form U-4: I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to arbitrated under the rules, constitutions, or bylaws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

NYSE Rule 347: Any controversy between a registered representative and any member or member organization arising out of the employment of such registered representative by and with such member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

NASD Code of Arbitration Procedure: Any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of associated person(s) with any members . . . shall be arbitrated.

NONE OF THESE FORUM CLAUSES COMPLY AS MANDATORY OR EXCLUSIONARY, THEY ARE ONLY PERMISSIVE.

In providing clarity and enforceability to forum selection clause language, the Ninth Circuit in defining the required contract language specifically agrees with the plaintiff's argument in front of Judge Kleinfeld in the oral argument (Page 8-12 transcript)

IN ADDITION

This defendant, the only defendant ever before this Court, is in direct violation of A.S. 09.05.015, Ins. Co of North America v. Marina Salina Cruz, 649 F2d 1266, (9th Cir. 1981). Under the licensing agreement, the BD Form, and State Law, this case should be ordered to State Court to be adjudicated.

SUMMARY

The plaintiff submits that the defendant is clear on the intent of the BD Form. The plaintiff states that the defendant has never denied that they have agreed to be sued in State Court for violation of state laws. In oral arguments before Judge Kleinfeld, defendants counsel was asked why they removed this action from State court, "your honor, this is our forum of first choice". This is the forum shopping concern opposed by Judge Sedwick in MUNOZ v. ALBUQUERQUE, 829 F Sup. 309, and ruling that priority should be given to the plaintiff's right to choose over the defendants. If the national licensing agreement is not enforceable in the Ninth Circuit, it would be just to notify all the States in the circuit of the non compliant contract language.

In comparing the BD Form's forum selection clause to the three contracts **enforced** by this Court: the BD Form specifies "to be sued in any Court" . . . "for violations of State law" . . . "as if a resident of the State"; **while** the three industry clauses are **only permissive** and don't exclude the right to sue in Court. Even if not artfully argued, the enforcement of arbitration, these forum clauses was not just.

The Plaintiff requests this Court to repair the past injustice of dismissing this case while on appeal of these issues and enforce the forum selection contract, the licensing agreement entered into freely by the defendant. In addition, this Court should enforce State Laws.

RESTFULLY submitted this 16th day of November, 1998.

"s/ Robert W Musser"

Plaintiff

MINUTES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ROBERT W. MUSSER v. SALOMON/SMITH BARNEY INC.

THE HONORABLE JOHN W. SEDWICK
CASE NO. 198-257 CV (JWS)

Secretary to Judge Sedwick
Gail M. Morgan

Official Recorder

PROCEEDINGS: **ORDER FROM CHAMBERS**

At docket 31, this court granted plaintiff Robert W. Musser leave to file a motion for reconsideration of the court's order at docket 27 granting defendant Salomon/Smith Barney, Inc/ summary judgement. Musser has now filed that motion at docket 32. Liberally construed in light of his pro se status, Musser's contention is that a forum selection clause divests this court of subject matter jurisdiction. Musser's arguments are the same previously rejected by Judge Kleinfeld. The Ninth Circuit affirmed Judge Kleinfeld's decision. To the extent Musser's latest motion attempts to argue the merits concerning whether or not arbitration was ever necessary, the order at docket 27 addresses Musser's contentions. Accordingly, Musser's motion for reconsideration is **DENIED**. The Clerk will enter an amended judgement consistent with this court's previous orders at dockets 27, 29, and 31, and will decline to accept any further motions from Musser except any motion related to an appeal to the Ninth Circuit.

ENTERED AT JUDGE'S DIRECTION
INITIALS: gmm
Secretary to Judge Sedwick

Date: November 17, 1998

JUDGEMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert W Musser
Plaintiff, Appellant

No. 99-35002

v.

CT/AG #: CV-98-00257-JWS

Salomon/Smith Barney, Inc.
Defendant, Appellee.

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court is this cause be, and hereby is affirmed

FILED
MAY 30, 2000
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA.

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Transcript of Proceedings before the
Honorable Judge Andrew Kleinfeld

Case No. A89 504 Civ

Oral Arguments
Anchorage, Alaska
Tuesday, August 7, 1990

Excerpt:
Page 2, Line 2

Court: Next, Musser moved to reconsider, at Docket 18. The motion to reconsider is denied. I have examined the document (referring to the BD Form), which Mr. Musser attached, and it does not provide for some alternative to arbitration. Rather the effect of the execution by Shearson Lehman, is to appoint an agent for service of process in the state, **and to consent to actions within the State Courts**, with the same effect as if Musser were a resident in this state, or rather **as if Shearson Lehman Hutton, were a resident of the state**, and had been served with process in the state.

In this case though, that makes no difference. If Shearson Lehman were a resident of Alaska and had been served with process in Alaska, but had a contract with Musser for arbitration of the particular type of dispute, then **Shearson Lehman would still be entitled to arbitration.**
(Line 16, Page 2), *emp. added*